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In The

Supreme Court of the United States

October Term, 1973

No. 73-859

ELIZABETH ANN PETERS,

Petitioner,

vs.

LEWIS V. SMITH and CLEO SMITH,

Respondents.

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES FOR THE SIXTH CIRCUIT

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MAY IT PLEASE THE COURT:

The Respondents pray that a Writ of Certiorari not issue to review the judgment herein of the Court of Appeals of the United States for the Sixth Circuit.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reprinted in the Appendix, *infra*, pp. 22b. It reverses the judgment of the United States District Court for the Eastern District of Kentucky, which is reprinted in the Appendix, *infra*, pp. 20b. The opinion has been officially reported at 482 F.2d 799 (1973).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was dated and entered on August 7, 1973, and the

order denying the petition for rehearing which is printed in the Appendix, infra, pp. 32b to 34b, was dated and entered on September 5, 1973. The jurisdiction of this Court rests upon Title 28 U. S. C. 1254(1).

QUESTION PRESENTED

1. Whether, in a diversity action in Federal District Court, arising from an auto accident between a citizen of Kentucky and citizens of Michigan, *Fed. R. Civ. P.* 3 or the applicable state statute defining the commencement of a civil action should apply, where the Michigan citizens, by filing their complaint with the court, would be within the statute of limitations if *Fed. R. Civ. P.* 3 applied, but where, because of the extra requirements of issuance of process to the marshals, would not be within the statute if state law controls.

STATUTES INVOLVED

Kentucky Revised Statutes, Chapter 413.140(1)(a) provide in pertinent part as follows:

> 413.140 Actions to be brought within one year.
>
> (1) The following actions shall be commenced within one year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant.
>
> 413.250 When action commences.
>
> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

413.270 Effect of judgment of no jurisdiction; application to administrative agencies.

(1) If any action is commenced in due time and in good faith in any court of this state and the defendants of any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

(2) As used in this section, 'court' means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky of the United States of America.

STATEMENT OF THE CASE

Plaintiffs, Lewis V. Smith and Cleo Smith, were injured in an automobile accident on May 3, 1970, in London, Kentucky. Plaintiffs are residents of the State of Michigan and defendant, Elizabeth Ann Peters, is a resident of the State of Kentucky.

Suit for personal injuries based on diversity of citizenship was instituted on April 23, 1971, in the United States District Court for the Eastern District of Michigan. Process was served on defendant personally by a Deputy United States Marshall in Lily, Kentucky, on April 28, 1971. On or about May 17, 1971, a Motion to Dismiss was filed by defendant on the grounds that the service of process issued out of the United States District Court in Michigan was not valid beyond the territorial limits of the state in which the District Court is located. Plaintiff

filed an Answer in Opposition to defendant's Motion to Dismiss and also filed a Motion for Change of Venue to the State of Kentucky under 28 U.S.C. Section 1404(a). The District Court in Michigan after reviewing the Memorandum of Law and hearing argument of counsel denied defendant's Motion to Dismiss and granted plaintiff's Motion to Transfer to the Federal District Court for the Eastern District of Kentucky.

Upon the transfer of this cause to the United States District Court for the eastern District of Kentucky, a Motion was filed by defendant in said Court to dismiss contending that the Court lacked jurisdiction over the defendant; that the service of process was insufficient and invalid including service of process made after transfer with process issued out of the District Court in Kentucky and that the District Court for the Eastern District of Michigan had no authority to transfer this cause to Kentucky because the lack of jurisdiction over defendant. After responses having been filed by plaintiffs to defendant's Motion, the Court rendered an Opinion and Order Dismissing plaintiffs' cause.

Pursuant to this action by the District Court, a timely appeal was taken to the United States Court of Appeals for the Sixth Circuit, which court reversed the judgment of the District Court. 482 F.2d 799 (1973). Petitioner's petition for a rehearing having been denied, *Appendix, infra,* pp. 32b, the petitioner now seeks a writ of certiorari from this Court.

The Respondents are now here asking this Court to deny certiorari to review the judgment of the Sixth Circuit Court of Appeals.

ARGUMENT

Respondents urge this court to refuse to grant certiorari to the Sixth Circuit Court of Appeals on the ground that no substantial confusion exists in inferior courts as to the law applicable to the question at hand, and upon the further ground that no actual conflict exists between the decision of the Sixth Circuit in the case at hand and that of the Eighth Circuit in *Groninger* v. *Davidson*, 334 F.2d 638; nor between the decision in the case at hand and that of the Sixth Circuit in *Sylvester* v. *Messler*, 351 F.2d 742, *cert. denied*, 382 U.S. 1011.

The alleged confusion and conflict has resulted from an erroneous gauging of the effect of this Court's decision in *Hanna* v. *Plummer*, 380 U.S. 460 upon its previous decision in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530.

The *Ragan* decision was the outcome of a judicial rule which had its birth in the case of *Erie R.R.* v. *Tompkins*, 304 U.S. 64, and was further shaped in *Guaranty Trust Co.* v. *York*, 326 U.S. 99. Briefly, the rule was to be applied to determine whether state or federal law would be applicable in a particular case brought under the jurisdiction of a Federal Court on the ground of diversity of citizenship. It became known, by way of short hand, as the "outcome-determinative" rule, and its application is illustrated by this Court's decision in *Ragan, supra.*

That case, which was an appeal from a decision by the Tenth Circuit Court of Appeals, concerned an automobile accident in Kansas between certain residents of that state and others who were from out of state. A suit for damages

had been filed in Federal District Court in Kansas, with jurisdiction premised on diversity of citizenship. The suit was filed in accordance with Federal Rule of Civil Procedure 3 within two years of the accident; however, process was not served until sometime after this two year period had elapsed. Defendant sought to advance the Kansas statute of limitations, which provided a limit of two years for the commencement of personal injury claims, as a bar to plaintiff's cause of action. This was premised upon the argument that the Kansas statutory rule concerning the commencement of a civil action was controlling. That statute mandated that a suit would not be considered commenced until the defendant had been personally served with process. If defendant's contention had been correct, the fact that he had not been served within two years, would bar that plaintiff's claim.

The plaintiff claimed that the correct rule for the determination of the time at which the action had been commenced was *Fed. R. Civ. P.* 3, which provides that a suit is commenced with the filing of the complaint with the court. Under this interpretation, the suit was timely within the Kansas statute of limitations.

This Court heard plaintiff's appeal from the dismissal of his cause of action by the District Court, and an affirmation thereof by the Tenth Circuit, and itself upheld the decision. That the force of the outcome determinative test was behind this decision is evidenced by the court:

> *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery

> could not be had in the state court, it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts. *Guaranty Trust Co.* v. *York* applied that principle to statutes of limitations on the theory that, where one is barred from recovery in the state court, he should likewise be barred in the federal court.

337 U.S. at 532. The court went on to reject a contention by plaintiff that the Feeral Rules must control in determining the manner in which a suit was to be commenced in Federal Court, on the ground that it was a question of procedure only. The Court found the question in ths case to be one of substance, relying greatly on the finding of the Tenth Circuit Court of Appeals that the Kansas statutory definition of commencement was an integral part of the Kansas Statute of Limitations.

This outcome determinative rule, which negated the application of Federal law in diversity cases whenever its application was to a question of "substance," rather than procedure and would result in an outcome different from that which would be reached under state law, continued to be strictly applied by Federal Courts until 1965, although not without much criticism and disfavor. In 1965, this court rejected the strict application of this outcome-determinative test in *Hanna* v. *Plummer*, 380 U.S. 460. Therein, in deciding that *Fed. R. Civ. P.* 4(d)(1), rather than a state rule, would govern on the question of proper service of process in a diversity action, this court put to rest the "talismanic" application of the *Ragan*-type "outcome determinative" test. The Court stated,

> [i]ndeed, the message of *York* itself is that choices between state and Federal law are to be made, not

> by application of any automatic, litmus paper criterion, but rather by reference to the policies underlying the *Erie* rule.

380 U.S. at 467. In so holding, the court noted that in a sense every procedural variation may be "outcome determinative" and thus posited that a court must go beneath this surface approach and determine if the policies underlying the *Erie* rule, discouragement of "forum shopping," and the protection of state residents from the inequitable result of having "substantial variation" between the law applicable in the courts of the state and that applied by Federal Courts within the state. Indeed, as the court pointed out, the fundamental flaw of the approach taken by such cases as *Ragan* was that it served entirely to invalidate a Federal Rule of Civil Procedure. This, to the Court, was a gross misapplication of the *Erie* doctrine. The court stated:

> The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

380 U.S. at 470. Thus it was that the backbone of the *Ragan* decision, the strict application of the outcome-determinative test, was discarded by this Court in *Hanna* v. *Plummer, supra.*

It is generally recognized that the *Hanna* decision, thus, had a large impact on the validity of *Ragan*. It has been posited that *Hanna* overruled *Ragan* "in a broad sense." *See, e.g.*, Note, 42 *N.Y.U.L. Rev.* 1139 (1967). As was stated by Mr. Justice Harlen in his concurring opinion, "I think the decision [*Ragan*] was wrong." 380 U.S. at 477. Nevertheless, the court in *Hanna* did not expressly overrule *Ragan*, and this "careful" failure, as it is often described, has let both courts and commentators ascribe continuing vitality to the *Ragan* decision. However, respondents contend that it is well recognized now that whatever life is still in *Ragan* is closely confined by the court's decision in *Hanna*, and, thus, *Ragan* itself, without the further explanation and consideration offered by *Hanna*, is no longer sufficient authority to stand alone on any question such as the one presented here.

A typical example of misconstruction of the effect of *Hanna* on *Ragan* is presented by the case of *Groninger* v. *Davison*, 364 F.2d 638. This case was decided only one year after *Hanna*, and perhaps before the effect of *Hanna* upon *Ragan* could be fully analyzed. In any event, the effect of this decision was to hold that, because *Hanna* had not expressly overruled *Ragan*, it had little or no effect in it at all, a position, as noted by respondents above, which is no longer the case among Circuit Courts of appeal.

Briefly, *Groninger* involved a suit for money damages arising from an automobile accident which occurred in Iowa on March 2, 1963. Plaintiff sought to bring suit in federal district court on the ground of diversity of citizenship, and so filed his complaint with the court on March 1, 1965. Delivery of the summons to the Federal Marshal occurred on March 3 of that year, and defendant was served the next

day. Defendant moved for a summary judgment, after amending his answer to allege that the Iowa statute of limitations, which required that actions for personal injuries be commenced within two years, had run. The basis of this argument was defendant's contention that the applicable determinant of the commencement of a suit in Iowa was to be found only in Iowa *Rule of Civil Procedure* 49, which provided that an action was commenced by delivery of process to the serving officer. Plaintiff, of course, contended that *Fed. R. Civ. P.* 3 applied, thus rendering the commencement of the action timely.

The Eighth Circuit Court of Appeals affirmed a decision dismissing plaintiff's cause of action, relying heavily on *Ragan* and refusing to apply *Hanna*. As the court stated:

> While it is difficult to reconcile *Hanna* v. *Plumber*, supra, with the holding in *Ragan*, we nevertheless must conclude that the majority of the Supreme Court, in supporting the opinion written by the Chief Justice, felt that it was not an overruling of *Ragan*. Until the Supreme Court itself overrules its very positive statements in *Ragan*, the lower courts must follow its holdings. This case is affirmed.

364 F.2d at 642.

It is respondent's contention that this "all or nothing" approach to *Ragan* is incorrect, and further that this has been recognized by Circuit Courts since the *Groninger* decision, in that they have refused the *Groninger* approach. Consequently, respondents claim that there is no substantial confusion on the question which could warrant the granting of certiorari in this case.

Respondents contend that the proper way to read *Ragan* is in the light of *Hanna*. Specifically, the *Hanna* court

obviously recognized the continuing viability of the basic premise of *Ragan*, that is, that the federal courts must refrain from untoward and undue encroachment upon the domain of state law in diversity of citizenship cases. However, the court in *Hanna* was in disagreement with the method or approach used by the *Ragan* court, and so desired to impose upon this premise a new "test"; that is, while the *Hanna* court agreed with *Erie* and *York* that state law is preeminent in certain areas, the manner of discovering the boundaries of this area of inviolability adopted by the *Ragan* court was too strict. So, while in agreement with the aim and premise of *Ragan*, the *Hanna* court wished to refine its method of analysis; instead of overruling *Ragan*, and perhaps casting its basis into doubt, it merely modified its effect, by reiterating the requirement that Federal Courts must look beyond mere "Talismans" and ascertain the effect of the applicable Federal law on the basis of the policy considerations discussed in *Erie*, as noted above.

That this is in fact the effect of *Hanna* or *Ragan*, as opposed to the *Groninger* case's "no effect at all" theory, has been recognized in the most recent decisions of Circuit Courts on the question, thus demonstrating that, in fact, no substantial uniformity exists in this area.

An example on point is *Sylvestri* v. *Warner & Swasey Co.*, 398 F.2d 598, a decision from the Second Circuit Court of Appeals. The facts therein are quite similar to the pattern of *Ragan* and *Groninger*, an auto accident resulting in the filing of a complaint shortly before the running of the statute of limitations, service at a date after the statutory period, and a consequent question as to whether

the state or federal definition of commencement should apply.

The Second Circuit Court of Appeals affirmed the decision of the District Court that the Federal rule controlled, but disagreed with the conclusion of the trial judge that *Hanna* had overruled *Ragan*.

Instead, in an insightful analysis, the Court stated:

> The Supreme Court not only did not specifically state in *Hanna* that it was overruling *Ragan*, but the Court several times cited *Ragan* by way of distinction. 380 U.S. at 462-63 n. 1, 469 n. 10, and 470 n. 12, 85 S.Ct. 1136. And Justice Harlan was speaking for himself when he stated that *Ragan*, if still good law, would require affirmance instead of reversal of the Court of Appeals. 380 U.S. at 476, 85 S. Ct. 1136 (concurring opinion). . . . Nevertheless, *Hanna* does represent a modification, or at least a refinement, of the "outcome determination" test as applied in *Ragan*, and it does enunciate a policy favoring the the supremacy of the Federal Rules which is not discussed in *Ragan*. Consequently, *Hanna* requires consideration of the factors underlying the choice between the state and federal rule rather than the automatic application of *Ragan*.

398 F.2d at 605. Thus, as the court recognized:

> The question then is whether in light of the priority accorded to the federal rules in *Hanna* and in light of the "outcome determination" test as explained there, Rule 3 should be applied.

Id. at 606. The court then went on to consider the question of whether the application of *Fed. R. Civ. P.* 3 would violate either of the policy considerations enunciated in *Erie* and *Hanna*, and emphatically decided that it would neither

result in forum shopping nor would it change the character or outcome of the litigation so as to discriminate unfairly against citizens of the forum state.

The second, and most recent example of this understanding of *Ragan* and *Hanna* is the decision by the Sixth Circuit Court of Appeals in the case at hand. The court there was found not only by the *Groninger* application of *Ragan*, but also by its own previous case, *Sylvester* v. *Messler*, 351 F.2d 472, *cert. denied*, 382 U.S. 1011, wherein it had originally stated the "all or nothing" acceptance of *Ragan* which was later incorporated by the *Groninger* court into its decision. However, as did the *Sylvestri* court, the Sixth Circuit this time expressly denied the applicability of *Ragan* in a strict sense, and instead recognized that the *Hanna* decision had limited greatly the use of the outcome-determinative test. Stark illustration of this fact is apparent in the court's reversal of the decision of the trial court applying outcome determination, and in its statement, in its Order on Petition for Rehearing, Appendix, *infra*, p. 32b, that "[t]o the extent that our decision conflicts with *Sylvester* v. *Messler*, supra, we decline to follow it."

What the Sixth Circuit Court of Appeals chose instead was the mode of analysis proffered by *Hanna*. The court adapted as its reasoning for holding that *Fed. R. Civ. P.* 3 did not encroach on state prerogative the reasoning which the *Hanna* court applied to its decision reaching the same result with respect to *Fed R. Civ. P.* 4(d)(1); and the Sixth Circuit held that the policy considerations which mandated to the *Hanna* court the decision that *Fed. R. Civ. P.* 4(d)(1) was within the *Erie* definition of Federal law which is applicable in diversity cases also held true for *Fed. R. Civ. P.* 3.

The complete break which the Sixth Circuit had made with its past history of adherance to the strict outcome-determinative analysis of such cases as *Ragan* and *Sylvester* v. *Messler*, coupled with the identical result reached, apparently entirely independently, by the Second Circuit in the *Sylvestri* case, leads respondents to contend that any present confusion over the applicability of *Fed. R. Civ. P.* 3 to the question of the tolling of a statute of limitations in diversity cases is no doubt quite minimal, and that any question which does exist yet will be dispelled by the reasoning behind these recent decisions, thus obviating the necessity for this Court to resolve the question. Indeed, it would appear that the distance of time has added much to judicial reflection on this question, as these most recent decisions show. At this point, it is necessary but to mention the case of *Anderson* v. *Papillon*, 445 F.2d 841, a decision from the Fifth Circuit in 1971, wherein it was decided that the "relation back" function of *Fed. R. Civ. P.* 15(c), concerning amendment of complaints to include new defendants, could not be used to reopen a statute of limitations which had otherwise run. In an oblique and hardly necessary dictum, the Fifth Circuit contended, without further substantive discussion, that *Fed. R. Civ. P.* 3 would always be precluded by state statutes of limitation. It is contended that this claim would be quickly withdrawn upon as deeper discussion of applicable cases, and thus that this apparent "off-hand" statement should not be read as a serious objection by the Fifth Circuit to the better analysis given the question by the Second and Sixth Circuits.

Indeed, as a matter of sound jurisprudence, it would seem that a close examination of the question by any court

at this time would lead it to the conclusion drawn by the Second and Sixth Circuits. The complex policy reasoning behind the *Erie* decision is ill served by a superficial application of a test such as was done in *Ragan*. No better example of this fact could be found than the case at hand, where to throw out this suit on a strict application of outcome-determination would be totally to ignore the true effect of *Erie* as interpreted clearly in *Hanna*.

As was briefly noted above in the discussion of *Hanna*, that decision emphasized the priority and importance of the Federal Rules, and rejected any contention that a state procedural rule could invalidate them. A fundamental error of *Ragan* was in failing adequately to deal with this; the other fundamental error of that decision was to stop at a surface analysis of the issue of the applicability of the Federal Rules in diversity situations, and not to go further to examine the application of the rule in the depth required by *Erie*.

Erie, as has been shown, requires the court to examine two factors before upholding or invalidating a Federal Rule of Civil Procedure in a given situation. That is, a court must determine to what extent the application of a Federal Rule will result in "forum shopping" or in an inequitable and substantial difference between results possible in state as opposed to Federal actions.

The application of *Fed. R. Civ. P.* 3 in the case at hand would result neither in any degree of forum-shopping nor in any substantially inequitable outcome. The Sixth Circuit itself thought the *Hanna* court's reasoning behind its decision that *Fed. R. Civ. P.* 4(d)(1) violated neither of these policy considerations entirely applicable to *Fed. R. Civ. P.*

3 as well. Added support for this conclusion may be obtained from the careful consideration of this question by Justice Harlan. In his concurrence in *Hanna*, he considered Rule 3 in the light of these two considerations, under the facts of the *Ragan* case itself, and concluded:

> I think that the decision was wrong. At most, application of the Federal Rule would have meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the federal system in proceeding under its own rules should have prevailed.

380 U.S. at 477.

Finally, as recently as the case of *Sylvestri* v. *Warner & Swasey Co., supra,* a Court of Appeals has found that the application of *Fed. R. Civ. P.* 3 does not offend the rationale of *Erie*. Basically, the court there rejected the idea that the application of *Fed. R. Civ. P.* 3 would lead to forum shopping on the ground that, while any suit filed in Federal Court *after* the running of the state statute would be precluded, the advantage of filing in Federal Court *before* the running of the statute is indeed scant; in most instances it would likely be only a few days. This fact was noted by the Sixth Circuit in the case at hand, where they found no evidence that filing in a Kentucky State Court at the same time as the filing in the Federal District Court would have resulted in the running of the statute of limitations under state law; in other words, in the great amount of cases,

the time differential is not so great as to be a factor in in the choice of forum.

In addition, the *Sylvestri* court found that the application of *Fed. R. Civ. P.* 3 would not violate the defendant's right to be free from "discrimination" in federal court. As that court noted, the application of the rule will not alter the conduct or character of the trial, and would not in any way alter the outcome of a trial. The only "burden" such application would have on a defendant would be to force him to face up to a possible duty to make amends for any harm caused a plantiff by participating in a trial. While this is obviously more of a burden than to be allowed to go free from any responsibility because of a legal technicality, still it cannot be said to outweigh the burden which would rest on the plaintiff, who would be forced to suffer his injuries without recompense because of a simple neglect of the calendar or the inability to gather all necessary proofs in the time allotted. Indeed, this latter result would seem to cut at the heart of the purpose of the Federal Rules themselves, which is to simplify the civil action, and to render parties less subject to the destruction of valid claims because of technical rules of procedure. It is for all these reasons that respondents contend that this Court should refuse to grant certiorari to the Court of Appeals for the Sixth Circuit, and should allow to stand the just result reached by that court in its determination of the case at hand.

Respondents also would argue an alternative ground for their position that certiorari should not issue in the case at hand. Respondents contend that the alleged conflict between the decision of the Eighth Circuit in *Gronin-*

ger v. *Davison* and that of the Sixth Circuit in the case at hand is in fact non-existent; that the two decisions can be distinguished and so reconciled.

As has been stated, the *Groninger* decision relied strongly on *Ragan* v. *Merchants Transfer Co., supra.* It was also noted that the subsequent decision of this Court in *Hanna* v. *Plummer, supra,* rejected what had been the basic postu- *Federal Rules of Civil Procedure* should be gauged by the *Federal Rules of Civil Procedure* should be guaged by the "outcome-determinative" test. Nevertheless, *Hanna* did not expressly overrule *Ragan,* and thus something of that decision must be left.

Because of the language used in *Hanna,* it is not possible that the *Ragan* view that *Fed. R. Civ. P.* 3 never takes precedence over the corresponding state rule still remains viable. *See* Note 20 *Stan. L. Rev.* 1281 (1968). As was noted above, the *Hanna* court flatly rejected any suggestion that state rules of procedure could be used to invalidate a Federal Rule. However, previous decisions, which arguably includes *Ragan,* which did not find the Federal Rules applicable were distinguished by the *Hanna* Court as holding that, "the scope of the Federal Rule was not as broad as the losing party urged." 380 U.S. at 470. It is argued that, in light of this language, it is possible to find that *Ragan* is still viable in its holding because *Fed. R. Civ. P.* 3 does not cover the situation involved therein. Conceivably, then, this means that while it can no longer be said that *Federal Rules of Civil Procedure* do not take priority over a general state definition of "commencement," it can be said that *Fed. R. Civ. P.* 3 does not extend to the situation represented by the holding of the *Ragan* Court that the defini-

tion of "commencement" in that statute was in "integral part" of the state statute of limitations. In other words, *Fed. R. Civ. P.* 3 will serve as the definition of the time of commencement of a civil action in a Federal Court in a diversity case, unless the state definition of commencement is an "integral part" of the applicable statute of limitations under consideration. *See Comment* 18 *S.D.L. Rev.* 185, 193 (1973).

This argument may be further illustrated by the examination of a recent case from the Tenth Circuit, *Ragan's* birthplace, *Chappel* v. *Rouch*, 448 F.2d 446 decided in 1971.

On facts essentially identical to those of *Ragan*, the Tenth Circuit found that the Federal Rule of Civil Procedure and not the state rule, would apply. In distinguishing *Ragan*, the court noted that the Kansas statutory definition of commencement at that time was held by the *Ragan* Court to be an integral part of the Kansas statute of limitations. However, since that time, the definition of commencement had been amended, and this new definition, the *Chappell* court held, was not integral to the statute of limitations. Having thus distinguished *Ragan*, the court held that *Hanna* controlled, and that *Fed. R. Civ. P.* 3 was the applicable definition of the commencement of an action for purposes of tolling the statute of limitations.

The *Chappell* decision focused explicitly on the wording of the two statutes, in distinguishing *Ragan*. In the words of one commentator:

> The court of appeals drew special attention to the wording of the commencement of action statute before it was revised. The former statute read as follows:

> *When action deemed commenced:* An action shall be deemed commenced, *within the meaning of this article,* as to each defendant, at the date of the summons which served on him, . . .
>
> Consequently the *Ragan* court concluded that since the commencement of action statute applied *only* to the article dealing with the statute of limitations, the statute virtually meant:
>
> An action for the purpose of tolling the statute of limitations shall be deemed commenced as to each defendant as of the date on which the summons is served on him . . .
>
> Oppositely, in the present revised Kansas Code the commencement of action statutes *does not apply* solely to the article dealing with limitations, *but rather applies generally to all actions:*
>
> A civil action is commenced by filing a petition with the clerk of the court, provided service of process is obtained . . . within ninety (90) days after the petition is filed; otherwise the action is deemed commenced at the time of service of process.

Comment, 18 *S.D.L. Rev.* 185, 196 (1973) (footnotes omitted).

In other words, the *Chappell* case accepts the theory that while *Hanna* has greatly intruded upon the domain formerly governed only by *Ragan,* the *Ragan* decision still has a limited viability. In terms of the question at hand, then, *Fed. R. Civ. P.* 3 has priority of application in all cases wherein the time of commencement of an action in a diversity case is called into question for purposes of the tolling of the applicable state statute of limitations, except where the applicable state statute of limitations is an integral part of the applicable statute of limitations. To be an integral part, under the *Chappell* distinction, the state defini-

tion of commencement must be so worded as to apply only to the statute of limitations. If, instead, the definition is used in connection with all questions concerning commencement, it is not an integral part of the statute of limitations within the meaning of these decisions.

Respondent contends that upon this basis the case of *Groninger* v. *Davison, supra,* and the instant case can be distinguished and thus reconciled, leaving no conflict between them. *Groninger* itself relied heavily upon the *Ragan* decision, and so, although the Court in that case made no explicit finding that the definition of commencement applied was integral to the statute of limitations, the decision should be read to follow *Ragan* fully, and implicitly to hold that the definition was integral. Indeed, an examination of the definition of commencement in force in Iowa at that time, *Iowa Rules of Civil Procedure* 49, shows that this conclusion is entirely reasonable, for the statute by its own words limits its application to the statute of limitations. The statute reads, in applicable part:

> For the purpose of determining whether an action has been commenced within the time allowed by statutes for *limitations of actions,* whether the limitation inheres in the statute creating the remedy or not, the delivery of the original notice to the sheriff of the county in which the action is brought with the intent that it be served immediately, which intent shall be presumed unless the contrary appears, shall also be deemed a commencement of the action.

(Emphasis supplied.) Indeed, this conclusion is buttressed by the fact that a separate rule concerning the commencement of actions is provided in the Iowa rules, and is written in very general terms, with the obvious intent of being

applicable in all other questions of commencement. *Iowa R. Civ. P.* 48.

The fact that distinguishes the case at bar from *Groninger* and *Ragan*, and permits the conclusion that *Hanna* is the controlling authority is that the Kentucky definition of commencement which was sought to be applied in this case is in fact not an integral part of the applicable state statute of limitations. Thus, it is possible for this case to exist in harmony with *Ragan* and *Groninger*, and removes any need for further review by this Court.

As a reading of the applicable state statutory definition of commencement will reveal, the statute is couched in very general language, and definitively does not share the characteristic of self-limitation to the statute of limitations which was revealed on the fact of *Iowa R. Civ. P.* 49 in the *Groninger* case, or on the Kansas statute in *Ragan*. *Ky. Rev. Stat.* §413.250, p. 2, *supra*. The fact that this provision is located within the chapter concerning limitation of actions does not by itself mean that it becomes an integral part of that specific statute, indeed, the Supreme Court of Kentucky on numerous occasions has found this definition of commencement applicable to questions other than that of the tolling of the statute of limitations. *See, e.g., Citizen's Bank & Trust* v. *McFuen*, 281 Ky. 113, 134 S.W.2d 1012; *Blue Grass Mining Co.* v. *North*, 265 Ky. 250, 96 S.W.2d 757.

Respondents feel that the Kentucky court's interpretation of this question should carry great weight upon this determination. Indeed, the Court of Appeals for the Sixth Circuit has itself found that *Ky. Rev. Stat.* § 413.250 was not part of the substantive statute of limitations, but rather

a purely procedural provision. *See Appendix, infra,* p. 25b And on this ground, the court was able to distinguish the case at hand from any suggestion of "outcome-determination," such as that which still remains under *Ragan's* interpretation of *Erie.* For this reason, respondent alleges that no conflict exists between *Groninger* v. *Davison, supra,* and the case at hand, as was alleged by petitioner, and thus concludes that there is no reason for this Court to grant certiorari.

As to the allegation of diversity, Respondent did not pursue any amendment of its pleadings because of the knowledge that petitioner was pursuing further appeal. For the reasons herein stated, this Court should refuse to grant certiorari.

STEPHEN G. DANKO
D'AVANZO & DANKO
12154 Dix-Toledo Road
Southgate, Michigan 48195
Telephone: 313-282-1611

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NO. 36399

LEWIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

COMPLAINT

Now comes Lewis V. Smith and Cleo Smith, his wife, by their attorneys, D'Avanzo and Danko, and for their cause of action, say:

COUNT I

1. Plaintiffs Lewis V. Smith and Cleo Smith, his wife, are residents of the State of Michigan and defendant, Elizabeth Ann Peters is a resident of the State of Kentucky. Further that the amount in contraversy exceed Ten Thousand ($10,000.00) Dollars.

2. On May 3, 1970 at approximately 3:50 P.M., plaintiff, Cleo Smith, was a passenger in a 1966 Pontiac automobile bearing 1970 Michigan License Plate No. KYR 798, which vehicle was owned and driven by plaintiff, Lewis V. Smith, in a northerly direction on US 25 in the City of London, Kentucky.

3. At the aforesaid time and place, defendant, Elizabeth Ann Peters, was the owner and operator of a 1963 Volvo automobile bearing 1970 Kentucky license plate No. 504 602, which was being driven by her in a northerly direction on US 25 in the City of London, Kentucky, in a careless, reckless and negligent manner.

4. At the aforesaid time and place, defendant drove her vehicle into the rear of plaintiff's automobile which had stopped on the said highway because of traffic having stopped in front of her, thereby causing extreme damage to plaintiff's automobile and severe and personal injuries to plaintiff as hereinafter set forth.

5. That notwithstanding the duties and obligations imposed upon the defendant herein by the statutes of the State of Kentucky, local laws the the rules of common law, defendant omitted and neglected to obey and observe said duties applicable to the operation of motor vehicles in the following particulars:

(a) Driving upon the said highway carelessly and heedlessly, in willful and wanton disregard to the rights or safety of other, and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger plaintiff.

(b) Failing to drive upon the said highway at a careful and prudent speed not greater than nor less than was reasonable and proper having due regard to the traffic, surface and width of the highway and of any other conditions then and there existing, and driving upon the said highway at a speed greater than would permit the vehicle to be brought to a stop within the assured clear distance ahead.

(c) In following plaintiff's vehicle more closely than

was reasonable and prudent, having due regard for the speed of her vehicle and the traffic upon and the condition of the highway.

(d) In failing to make proper observation of existing conditions and control and striking the rear of plaintiff's vehicle while it was lawfully stopped upon the highway.

6. As a direct and proximate result of the aforesaid negligent acts and omissions by defendant, plaintiff was suddenly and violently thrown about and against the interior of her automobile with such force that she sustained severe injuries to her neck, shoulders and back, all of which caused excruciating pain and suffering and injury.

7. By reason of the said injuries and the sequelae thereof, plaintiff has been subjected to severe and continued body and head pains and require continual medical treatment. Further, that said injuries have prevented plaintiff from pursuing and performing her ordinary activities, household duties and occupation for long periods of time at great loss of income and because of the permanent nature of said injuries, plaintiff will in the future endure paid and suffering, require medical attention and be restricted in her normal pursuits, activities and occupation, all at great personal loss and discomfiture.

WHEREFORE, plaintiff, Cleo Smith, prays for Judgment against the defendant, Elizabeth Ann Peters, in the amount of Thirty Five Thousand ($35,000.00) Dollars, plus interest, costs and attorney fees.

COUNT II

8. Plaintiff Lewis V. Smith, incorporates by express reference each and every of the allegations contained in Count I.

9. By reason of the injuries sustained by his wife, Cleo Smith, plaintiff has been required to expend large sums of money for medical and hospital treatment and will in the future by required to expend additional monies for such case and treatment because of the permanent nature of the injuries sustained by his wife. Further, plaintiff has been deprived of the services of his wife for long periods of time and will in the future sustain the loss of such services all at great personal loss and inconvenience.

WHEREFORE, plaintiff, Lewis V. Smith, praye for Judgment against the defendant, Elizabeth Ann Peters, in the amount of Fifteen Thousand ($15,000.00) Dollars, plus interest, costs and attorney fees.

/s/ STEPHEN G. DANKO
D'Avanzo and Danko
By: Stephen G. Danko
Attorneys for Plaintiffs
12154 Dix-Toledo Road
Southgate, Michigan 48195
Av. 2-1611

STATE OF MICHIGAN
IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DIVISION

Case No. 36399

LOUIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

MOTION TO DISMISS

Now comes the above named defendant by attorneys Eggenberger, Eggenberger, McKinney & Weber and pursuant to rule 12 (B) (2) move this honorable court for an order to dismiss this action for lack of jurisdiction, and in support of such motion, says:

1. That the accident of which this cause of action arises occurred in the state of Kentucky.

2. That defendant Elizabeth Ann Peters is a resident of the state of Kentucky.

3. That service of process was purported to be made upon the defendant in the state of Kentucky as more fully appears in the return of service filed with the court.

This motion is based upon the files of this court and cause, the return of service previous filed, and the affidavit

of John P. McKinney attached hereto and made a part hereof.

EGGENBERGER, EGGENBERGER,
McKINNEY & WEBER
BY /s/ JOHN P. McKINNEY
Attorneys for defendant
1600 Guardian Building
Detroit, Michigan 48226
961-9722

Dated: May 17, 1971
JPM:ch

AFFIDAVIT

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

JOHN P. McKINNEY, being first duly sworn, deposes and says that he is an attorney licensed to practice law in the State of Michigan and duly associated with Eggenberger, Eggenberger, McKinney & Weber, attorneys for defendant in the above entitled cause; that he prepared and read the attached motion to dismiss and that same is true of his own knowledge and belief.

Further deponent saith not.

/s/ JOHN P. McKINNEY

Subscribed and sworn to before me
on this 17th day of May, 1971
/s/ KATHLEEN E. BASSFORD
KATHLEEN E. BASSFORD, Notary Public
County of Wayne, State of Michigan
My Commission Expires: January 13, 1973.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 36399

LEWIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

PLAINTIFFS' ANSWER IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR CHANGE OF VENUE

Now comes Lewis V. Smith and Cleo Smith, his wife, plaintiffs in the above entitled cause by their attorneys, D'Avanzo and Danko, and for their answer in opposition to defendant's motion to dismiss and for their motion for change of venue state as follows:

1. That proper venue in this cause lies in the State of Michigan where all plaintiffs reside and in the State of Kentucky where defendant resides and where the cause of action occurred.

2. That to dismiss plaintiffs' cause of action would result in a serious injustice to plaintiffs' case in that the statute of limitations for the State of Kentucky, being one (1) year, has ran as of May 3, 1971.

3. That a change of venue to the State of Kentucky is proper under 28 U.S.C. Section 1404(a).

WHEREFORE, plaintiffs pray that defendant's motion to dismiss be denied and that this case be transferred to the District Court for the State of Kentucky.

D'AVANZO AND DANKO
BY: /s/ STEPHEN G. DANKO
Attorneys for Plaintiffs
12154 Dix-Toledo Road
Southgate, Michigan 48195
Av. 2-1611

Dated: June 15, 1971

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 36399

LEWIS V. SMITH and CLEO SMITH, his wife,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND GRANTING PLAINTIFFS' MOTION TO TRANSFER TO THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

At a session of said Court held in the Courthouse in the City of Detroit, Eastern District of Michigan, Southern Division, on June 29, 1971.
PRESENT: Hon. Damon J. Keith, United States District Judge.

This cause having come on to be heard upon the Motion of defendant to dismiss for lack of personal jurisdiction, the plaintiff having replied to said Motion and filed a Motion to transfer said cause, the Court being fully advised in the premises and after argument of counsel:

IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of personal jurisdiction be denied.

IT IS HEREBY ORDERED that in the interst of justice, this cause be, and the same is hereby, transferred to the Federal District Court for the Eastern District of Kentucky, London Division, for further proceedings.

DAMON J. KEITH
United States District Judge

Approved:
EGGENBERGER, EGGENBERGER,
McKINNEY & WEBER
By: /s/ JOHN P. McKINNEY
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

Civil Action No. 1986

LEWIS V. SMITH and CLEO SMITH,
Plaintiffs,

vs.

ELIZAETH ANN PETERS,
Defendant.

MOTION

Comes now the defendant, by counsel, and moves the Court to quash the return of process served on he defendant herein on August 10, 1971, for the following reasons:

(1) The action was not commenced in good faith as required by the laws of the Commonwealth of Kentucky, because the instant action was filed in the District Court of the United States for the Southern District of Michigan, and thereafter transferred to this Court, and this Court is without jurisdiction to issue process for the commencement of an action under the laws of Kentucky on transfer of a case from another district outside Kentucky to this district.

(2) The Kentucky Satute of Limitations had expired before the issuance of the summons herein, dated August 3, 1971, and the plaintiff's action is now barred by reason thereof.

Upon this Motion the defendant demands judgment of the Court.

HAMM, TAYLOR, MILBY & FARMER
P.O. Drawer "A"
London, Kentucky 40741
By: /s/ BOYD F. TAYLOR
Attorneys for Defendant

NOTICE OF HEARING:

Notice is hereby given that the foregoing Motion will be heard at such a time and place as may be designated by the Court.

/s/ BOYD F. TAYLOR
Of Counsel for the Defendant

CERTIFICATE:

The undersigned certifies that the foregoing Motion was served upon the plaintiff by mailing a true copy thereof to Hon. C. R. Luker, 108 East Fourth Street, London, Kentucky 40741, and D'Avanzo and Danko, 12154 Dix-Toledo Road, Southgate, Michigan 48195, on this 20th day of August, 1971.

/s/ BOYD F. TAYLOR
Of Counsel for the Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

NO. 1986

LEWIS V. SMITH, ET AL,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

MEMORANDUM OPINION
(Filed May 24, 1972)

On April 23, 1971, the plaintiffs filed, in the United States District Court for the Eastern District of Michigan, a complaint in which they allege that they are "residents" of the State of Michigan, that the defendant is a "resident" of the State of Kentucky, that the amount in controversy "exceed Ten Thousand Dollars ($10,000.00)" and that the plaintiffs' damages arise from an automobile accident which occurred in Laurel County, Kentucky on May 3, 1970, as a result of the negligent operati n of an automobile by the defendant. Process was issued by the Michigan Court and was served on the defendant, in Kentucky, on April 28, 1971. The defendant promptly filed a motion to dismiss for lack of jurisdiction. The plaintiffs responded with a motion to transfer the action to this Court. The plaintiffs' motion was sustained and, on

June 29, 1971, the action was transferred by an order which fails to recite its statutory basis and which states only that such transfer is "in the interest of justice." Following the transfer of the action, the plaintiffs caused process to be issued, on August 3, 1971, by this Court, which process was served on the defendant on August 10, 1971. The defendant has renewed her motion to dismiss and has filed motions seeking to quash the return of the process issued by the Michigan Court and by this Court. The defendant is contending that the service of the process of the Michigan Court should be quashed because there was no authority for such extraterritorial service, that the action should be dismissed because of the manifest defects in the plaintiffs' jurisdictional allegations, that the transfer of the action was improper and that the action is barred because of the running of the Statute of Limitations. The plaintiffs are contending that the transfer of the action was proper, that the commencement of the action in Michigan was sufficient compliance with the Statute of Limitations and that their defective jurisdictional allegations can be cured by amendment to their complaint.

Under the provisions of 28 U.S.C. 1953, defective jurisdictional allegations may be amended "upon terms, in the trial or appellate courts." By virtue of said provisions, such defective allegations do not require the dismissal of the action, and it has been specifically held that curative amendments may be supplied following the running of the pertinent limitation period. *Carwile* v. *Public Service Company of Indiana, Inc.*, 315 F.2d 301. Further, cases such as *Taylor* v. *Love*, 415 F.2d 1118 (6th Cir. 1969), make it abundantly clear that under the provisions of 28 U.S.C. 1406(a) a district court may transfer an action

based upon diversity of citizenship even though the court does not have jurisdiction over the person of the defendant and even though the action may have been brought in the transferring district solely to avoid the running of the applicable Statute of Limitations.

Granting, however, that the plaintiffs' defective jurisdictional allegations are curable by amendment and that the United States District Court for the Eastern District of Michigan had the power to transfer the action to this Court, under the now axiomatic doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 65 (1938), this Court is obliged to decide all outcome determinative questions as the Kentucky Court of Appeals would direct a Kentucky Circuit Court which had received an identical case in an identical position.

KRS 413.140(1)(a) provides that an action for injury "to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant" shall be commenced within one year after the cause of action occurred. The commencement of an action is defined in KRS 413.250, which provides:

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

An exception to the rule of KRS 413.250 is created by the language of KRS 413.270(1), which reads:

> If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or

his representative may, within ninety days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any Statute of Limitations.

Following the familiar rule that statutes in *pari materia* must be constructed together, it appears that the net effect of the foregoing statutes is that an action for personal injuries accruing in Kentucky is barred by limitations unless process is issued in good faith from the court having jurisdiction of the action within one year from the accrual of the cause of action except that if such process is timely issued in good faith by a "court of this state", which later is determined to be without jurisdiction, and if the plaintiff causes process to be issued in good faith from the proper court within ninety days from such determination, the action is not barred until the expiration of one year plus the period of time between the issuance of process from the respective courts. The Kentucky Court of Appeals has expressly held that a United States District Court "in Kentucky" is a "court of this state" within the meaning of KRS 413.270(1).

In the opinion of the Court, however, the Kentucky Court of Appeals would obviously not construe "a court of this state" to include a United States Court sitting in Michigan, and, thus, if the plaintiffs' claim is not barred by limitation, it must be because of the sufficiency of the commencement of this action in the Michigan Court. Under the express provisions of K.R.S. 413.250, such commencement could be deemed sufficient only if the Michigan court could be said to have "jurisdiction of the cause of action."

The general rule, which has been followed by the Kentucky courts in cases such as *Covington Trust Company of Covington* v. *Owens*, 278 Ky. 695, 129 S.W.2d 186 (1939), is that jurisdiction of a cause of action requires jurisdiction of the subject matter and jurisdiction of the parties who might later complain of a judgment rendered in the action. The plaintiffs have offered no theory as to how the Michigan court could have acquired jurisdiction of the person of the defendant, and the Court is aware of none. It is therefore manifest that the Michigan Court is not a court "having jurisdiction of the cause of action" such that the issuance of process from it would have made the action timely under Kentucky law.

The first process issued from a court having jurisdiction of the action was the process of this Court issued on August 3, 1971. In view of that fact and in view of the fact that the plaintiffs had caused no process to be issued by any court in Kentucky within one year from the accrual of their cause of action, Kentucky law dictates that the action is barred by limitations.

The Court is aware that this conclusion is inconsonant with certain *dicta* in *Carson* v. *U-Haul Co.*, 434 F.2d 916 (6th Cir. 1970). In that case the plantiff brought suit in a federal court in Georgia seeking recovery from Kentucky defendants as a result of an accident which occurred in Georgia. The action was brought some 23 months after the accident occurred. The appellate court held that upon the transfer of the action to this district, which was necessary if jurisdiction was to be had of the person of some of the defendants, Kentucky limitation law applied to the case and the action was, therefore, untimely. The court remarked that had the action been commenced in Georgia

within one year of the accrual of the cause, such commencement would have been sufficient to make the action timely. This remark was made without reference, however, to the peculiar definition of the commencement of an action statutorily embodied in Kentucky's limitations laws.

The federal statute providing for the transfer of an action from a court lacking jurisdiction, 28 U.S.C. 1406 (a), and the landmark case interpreting same, *Goldlawr, Inc.* v. *Heiman,* 369 U.S. 463 (1962), purport only to eliminate a procedural element which might kill an action which was otherwise viable within the meaning of the relevant statute of limitations. Neither the statute nor *Goldlawr,* however, purport to engraft a federal definition of the commencement of an action onto state limitation laws, thereby breathing life into actions which were never timely under state law. Stated in terms of this case, if the commencement of the action in the Michigan Court had been sufficient under Kentucky limitations law, the transfer of the action would have kept the cause of action alive, free of the limitations defense which would inhere in dismissal and refiling. The transfer could not, however, make sufficient the original commencement of the action for the purpose of the limitations question if the original commencement was insufficient under Kentucy law. The Court is convinced, for the reasons stated hereinabove, that this action was never sufficiently commenced to bar the defense of limitations.

For all of the foregoing reasons the defendants motions to Quash the service of process from the United States District Court for the Eastern District of Michigan and to dismiss this action should be sustained. Upon the sus-

taining of said motions, the defendant's motion to quash the service of process of this Court will be rendered moot, and the same should therefore be overruled.

This 24th day of May, 1972.

An Order in conformity herewith will be this day entered.

/s/ BERNARD T. MOYNAHAN, JR.
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

NO. 1986

LEWIS V. SMITH, ET AL,
Plaintiffs,

vs.

ELIZABETH ANN PETERS,
Defendant.

ORDER

(Filed May 24, 1972)

In conformity with the Memorandum Opinion this date entered herein, IT IS ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) The motion to Quash the service of process from the United States District Court for the Eastern District of Michigan and the Motion to Dismiss is hereby sustained, and this cause is hereby dismissed.

(2) In view of the Court's ruling in numerical paragraph (1) hereof, the Motion to quash service of this Court is moot and same is overruled.

(3) That this cause be and the same is hereby stricken from the docket.

This the 24th day of May, 1972.

/s/ BERNARD T. MOYNAHAN, JR.
Judge

Notice is hereby given of the Entry of this Order or Judgment on May 30, 1972.

DAVIS T. McGARVEY, Clerk
By: /s/ SHIRLEY E. MILLS
D.C.

No. 72-1746

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEWIS V. SMITH and CLEO SMITH,
Plaintiffs-Appellants,

v.

ELIZABETH ANN PETERS,
Defendant-Appellee.

APPEAL from United States District Court for the Eastern District of Kentucky.

Decided and Filed August 7, 1973.

Before WEICK, EDWARDS and MCCREE, Circuit Judges.

WEICK, Circuit Judge. This appeal presents the question whether federal courts are required to apply the Federal Rule of Civil Procedure (Rult 3) or a state statute which conflicts therewith, to determine the issue as to when an action is commenced in the federal courts.

The question arose in an action for damages in excess of $10,000, for personal injuries resulting from an automobile accident which occurred in Kentucky on May 3, 1970. The action was filed on April 23, 1971, by the plaintiffs against the defendant, in the United States District Court for the Eastern District of Michigan. Plaintiffs were residents of Michigan; the defendant was a resident of Kentucky; and jurisdiction was based on diversity of citizenship. Summons on the complaint was issued and served

on the defendant by the United States Marshal in Kentucky, on April 28, 1971.

Defendant filed a motion to dismiss for lack of jurisdiction since she had been served in Kentucky, rather than in Michigan. Plaintiffs then filed a motion to transfer the case to the Eastern District of Kentucky(where defendant resided), which motion was granted by the Court as being "in the interest of justice," as provided by 28 U.S.C. § 1404 (a). After the transfer, plaintiffs caused another summons to issue on August 3, 1971, which summons was served on the defendant on August 10, 1971.

Defendant, after the transfer, renewed her motion to dismiss the action and filed motions to quash the Marshal's return of service issued by the District Court in Michigan, and also in Kentucky. The District Court granted the motion to dismiss, holding that Kentucky's one-year statute of limitations was a bar, and that the timely filing of the action in the District Court in Michigan did not toll the operation of the Kentucky statute of limitations.

It was the view of the District Court that Rule 3 of the Federal Rules of Civil Procedure, which provides:

> "A civil action is commenced by filing a complaint with the Court,"

was not controlling over Kentucky's statute with respect to the time of commencement of an action. The Kentucky statute provided:

> "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the Court having jurisdiction of the cause of action." (KRS 413.250)

A saving clause is provided in KRS 413.270(1), as follows:

> "If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation."

The District Court was of the view that the decision of the Supreme Court in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), required the Court to decide all "outcome determinative questions" according to state law, and it held that Rule 3 of Federal Rules of Civil Procedure, which conflicts with KRS 413.250, was not controlling. The effect of the District Court's holding was to render inapplicable Rule 3. We reverse.

The complaint was timely filed in the United States District Court for the Eastern District of Michigan, within the one-year period required by the Kentucky statute of limitations, and defendant was served in Kentucky within that period, although such service was not authorized. The Michigan statute of limitations was three years. M.S.A. 27 A 5805. Thus plaintiffs' complaint was timely filed under the laws of both Michigan and Kentucky.

In our opinion, the District Court erred in holding that the manner of commencement of an action in the federal courts is an "outcome determinative question" which a federal court, under *Erie R.R.* v. *Tompkins, supra,* is required to determine under state, rather than federal law. In our view the decision as to when the action was commenced determines only whether the action is to continue;

it is purely procedural, and does not relate to the substantive issues of the case.

This question, however, was set to rest by the Supreme Court in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), which case was not considered by the District Judge in his Memorandum Opinion. *Hanna*, like the present case, was a diversity action for damages in excess of $10,000, for personal injuries, the action having been filed in the federal court against an executor of an estate. Rule 4(d) (1) of the Federal Rules of Civil Procedure required service of process to be made on the defendant personally, or by leaving copies at his dwelling house with some person of suitable age and discretion, residing therein. The summons was left with defendant's wife at his residence, concededly in compliance with Rule 4(d) (1). The service, however, did not comply with a Massachusetts statute which required summons to be served personally on the defendant in an action against an executor or administrator. The defendant filed a motion to dismiss on the ground that Massachusetts' one-year statute of limitations barred the action since the defendant had never been served as required by the Massachusetts statute. The District Court, relying on *Ragan* v. *Merchants Transfer & Whse. Co.*, 337 U.S. 530 (1949), and *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), dismissed the action. The Court of Appeals affirmed. The Supreme Court, in a unanimous decision, reversed, holding that Rule 4(d) (1) was "designed to control service of process in diversity actions . . .," and it was a valid rule. (380 U.S. at 463).

The Court said:

> "In the first place, it is doubtful that, even if there were no Federal Rule making it clear that in-hand

service is not required in diversity actions, the *Erie* rule would have obligated the District Court to follow the Massachusetts procedure. 'Outcome-determination' analysis was never intended to serve as a talisman. *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525, 537. Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule. *Guaranty Trust Co.* v. *York, supra*, at 108-112." (*Id.* at 466, 467).

The Court further said:

"The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point 'outcome-determinative' in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d) (1) governs, the litigation will continue. But in this sense *every* procedural variation is 'outcome-determinative.' For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in the state courts, even though enforcement of the wederal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented

with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served. Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of inhand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." (380 U.S. at 468, 469).

The Court further said:

"There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co.* v. *Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." (Emphasis added.) (380 U.S. at 469-470).

Like the Massachusetts statute in *Hanna*, the Kentucky statute, KRS 413.250, clashes with Rule 3. In closing, the Court in *Hanna* said:

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d) (1) is valid and controls the instant case." (*Id.* at 473-474).

The decision in *Hanna* is somewhat in conflict with the Court's decision in *Ragan* v. *Merchants Transfer & Whse. Co.*, 337 U.S. 530 (1949). However, Mr. Justice Harlan, in his concurring opinion, in referring to *Ragan*, stated with characteristic simplicity: "I think that the decision was wrong." 380 U.S. at 477.

The fact that the District Court in Michigan had no personal jurisdiction over the defendant does not militate against its right to transfer the case. As well stated by Mr. Justice Black, who wrote the opinion for the Court in *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962):

> "Section 1406(a), under which the Pennsylvania District Court transferred this case, provides:
>
> > 'The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.'
>
> Nothing in that language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. And we cannot agree that such a restrictive interpretation can be supported by its legislative history—either that relied upon by the Court of Appeals or any other that has been brought

to our attention. The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be 'found' or that they 'transact . . . business' in the Eastern District of Pennsylvania. The language and history of § 1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.

"The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitations would otherwise apply. The filing itself shows the proper diligence on the

> part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities.' It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired." (369 U.S. at 465-467).

We followed *Goldlawr* in *Taylor* v. *Love*, 415 F.2d 1118 (6th Cir. 1969); *cf.*, *Carson* v. *U-Haul Co.*, 434 F.2d 916 (6th Cir. 1970).

In *Mohler* v. *Miller*, 236 F.2d 153 (6th Cir. 1956), Chief Judge Simons, writing for the Court, stated:

> "This does not, however, answer the question as to when the appellant's action was begun. In a well considered opinion in *Isaacks* v. *Jeffers, supra*, it was held that where a complaint was filed in the Federal District Court before the expiration of the statute of limitations, the action was commenced and the running of the statute was interrupted by the filing of such complaint although process was not actually served until more than 60 days after the expiration of the limitation period. While state law controls the time within which an action must be begun, the manner in which an action is commenced and when it is

> deemed to have begun, are governed by the law of the forum. These matters are procedural and not substantive. This reasoning was approved and followed by Judge Learned Hand in *Bomar* v. *Keyes*, *supra* [162 F.2d 140]. wherein it was explicitly held: 'However, we now hold that it is the filing of the complaint which tolls the statute. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U.S. C.A. * * * have made no longer applicable § 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service.' " (*Id.* at 155).

He further stated:

> "Nor is this a case where 'limitation is annexed as a condition to the very right of action created. The Civil Rights Act is not cast in that form; and when a right is not so conditioned, the statute of limitations is treated as going to the remedy.' *Bomar* v. *Keyes*, *supra*, 162 F.2d at page 140. There is no such condition in the Michigan statute." (*Id.* at 155-156).

The judgment of the District Court is reversed, and the cause is remanded for trial.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-1746

LEWIS V. SMITH and CLEO SMITH,
Plaintiffs-Appellants,

vs.

ELIZABETH ANN PETERS,
Defendant-Appellee.

ORDER ON PETITION FOR REHEARING

(Filed September 5, 1973)

Before WEICK, EDWARDS and McCREE, Circuit Judges.

Ragan v. *Merchants Transfer & Whse. Co.*, 337 U.S. 530 (1949) may be distinguished from our case. In *Ragan*, on page 532 the Court said:

> "It is concerned that if the present case were in a Kansas Court it would be barred. The theory of *Guaranty Trust Co.* v. *York* would therefore seem to bar it in the federal court, as the Court of Appeals held."

In *Hanna* v. *Plumer*, 380 U.S. 460 (1965), the Court, in referring to the plaintiff in that case said:

> "Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery;[10] . . . ." (*Id.* at 469)

Footnote 10 cited *Ragan*, containing the above quotation. In our case, contrary to *Ragan*, there was no concession that if the case had been filed in a Kentucky court it would have been barred. As a matter of fact if it had been filed in a Kentucky court it would not have been barred because the action in the District Court not only was filed within the Kentucky one-year statute of limitation period, but summons was served on the defendant within that period, although such service was not authorized.

Appellee relies on *Sylvester* v. *Messler*, 246 F.Supp. 1 (E.D.Mich., 1964), *aff'd per curiam*, 351 F.2d 472 (6th Cir. 1965), *cert. denied*, 382 U.S. 1011, where the plaintiff failed to comply with the time and service requirements of the Michigan three-year statute of limitations.

The complaint was filed three days before the statute of limitations ran, but the summons and complaint were not placed in the hands of the Marshal until about one month later. Plaintiffs' attorney had attempted to serve the papers himself, without first having obtained a special appointment for that purpose as required by Rule 4(c) Fed. R. Civil P.

In following *Ragan*, we were impressed by the fact that the Supreme Court in *Hanna* v. *Plumer* carefully refrained from overruling *Ragan*. The panel did not discuss the distinction which we pointed out above, as it did not exist in that case.

In *Groninger* v. *Davison*, 364 F.2d 638 (8th Cir. 1966), the Court also found it difficult to reconcile *Hanna* with *Ragan*, but because the Supreme Court did not expressly overrule *Ragan* the Court concluded that it was obligated to follow *Ragan*. The Court cited *Sylvester* v. *Messler*, *supra*.

We followed *Hanna* v. *Plumer, supra,* which was decided subsequent to *Ragan.* We also experienced difficulty in reconciling the two cases. In any event, *Ragan* is distinguishable from our case. To the extent that our decision conflicts with *Sylvester* v. *Messler, supra,* we decline to follow it.

In our opinion Rule 3 of the Federal Rules of Civil Procedure, and not a state statute, governs as to the commencement of actions in federal courts.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk

PROOF OF SERVICE

I, Stephen G. Danko, attorney for the Respondent herein and a member of the Bar of this Court hereby certify that on this 1st day of March, 1974, three copies of the Petition for Writ of Certiorari was mailed, first class, postage prepaid to Hon. Boyd F. Taylor, P. O. Drawer "A", London, Kentucky 40741, counsel for Petitioner. I further certify that all parties required to be served have been served.

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